Firstcrest Global Limited & Ors v Indexia Assets and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–02–785 OF 2005 AND NO W-02–786 OF 2005
AZIZ MOHAMAD, JAMES FOONG AND ZULKEFLI JJCA
13 JULY 2006

Civil Procedure — Injunction — Injunction to restrain sale of shares to third party — Terms of the sale of shares agreement — Whether relief confined only to damages — Whether balance of convenience lies in granting injunction

Companies and Corporations — Shares — Sale of shares — Sale of shares agreement — Nature — Whether it was a contract to sell or an executed contract of sale — Whether buyer had proprietary right to the shares

The first respondent entered into a sale of shares agreement on 20 April 2005 to sell shares in a company known as QSR Brands Berhad (QSR) to the first appellant and also Chain Valley Ltd (first appellant in another case No W–02–786–05 which are being heard together). The second and third respondents entered into a sale of shares agreement with the second and third appellants respectively to sell their shares in QSR. A power of attorney is granted to each purchaser by the respective vendors. On 20 June 2005, the fourth respondent entered into sale and purchase agreements with the first, second and third respondents respectively to purchase their respective QSR shares, which are the same shares agreed to be sold to the first, second and third appellants ('the block of disputed shares'). This block forms 12.73% of the entire shareholding of QSR. The fourth respondent also purchased shares from another QSR shareholder which held 20.4% of QSR total shareholding. On the same day, the fourth respondent, through its merchant banker, made a public announcement of these purchases. Upon hearing the fourth respondent's public announcement, the first, second and third appellants together with the fourth appellant (who declares itself as the current beneficial and/or legal owner of the first, second and third appellants) filed a writ of summons for a declaration that the agreements entered into between the fourth respondent and the first, second and third respondents are void ab initio and also an injunction to restrain the first, second, third and fifth defendants (first, second and third respondents and UOB), dealing with the said shares in any manner. The appellants also applied for an injunction against first, second, third and fourth respondents and UOB to restrain from selling or dealing with the QSR shares. The learned high court judge felt that: (a) since damages can be ascertained; (b) that it is an adequate compensation for the loss to appellants if they were to finally succeed at the trial and; (c) there being no evidence that the respondents are not in a financial position to pay such damages, if awarded, the application was dismissed. The appellants appealed. The learned counsel for the appellants submitted that the block of disputed shares is a 'strategic stake' to gain control over the management of QSR and damages as compensation would not be an adequate remedy.

Held, dismissing the appeal:

(1) There was no assertion of management control over QSR or the strategic stake disclosed in their pleadings. What was disclosed may be an event subsequent to the said decision of the learned high court judge. But such subsequent events cannot be resorted to construe a meaning of a certain term in the agreement (see *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456). If the appellate court were to accept such subsequent event, then there would be no limit as to the extent to which these (subsequent events) are to be received for consideration. The appellate court, in the role of a reviewer of decision from the High Court, must confine itself to a fixed set of materials for consideration, and this must be those 'as argued' in the court below (see para 28).

(2) The terms of the sale of shares agreement, is primarily, by nature, a monetary contract. The purchaser of the disputed block of shares is allowed to resell the shares at a higher price and if the sub-sale fetches a higher price the parties will share the difference. The tone expressed in the agreement certainly does not imply, in any manner whatsoever, that the shares to be sold to the appellants are for leverage to gain control of the management of QSR (see para 29).

(3) By the nature of the sale of shares agreement, it is a contract to sell rather than an executed contract of sale. Being only a contract to sell, the proprietary right to the shares remained with the first, second and third respondents. And even if these respondents have breached their obligation by refusing to sell this disputed block of shares to the appellants, the appellants' remedy is restricted to a personal claim against the respondents for damages, not for the proprietary right to the shares. When their relief is confined to damages, and such damages can be assessed, and the respondents are able to pay for them, then according to the principle laid out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, no interim injunction should be granted, however strong the case of the appellants may be (see para 32).

(4) The Power of Attorney is only a subsidiary document to the Sale of Shares Agreement. Without the Sale of Shares Agreement, which is the principal instrument, the Power of Attorney cannot subsist. It does not have a life of its own. It is appendant to the Sale of Shares Agreement. So when the principal agreement cannot give proprietary right in law then the Power of Attorney, a subsidiary instrument, also confers no such right (see para 33).

(5) The disputed block of shares is that of a public company listed in the Kuala Lumpur Stock Exchange. QSR shares are freely traded in the Kuala Lumpur Stock Exchange. This exposure makes quantification, for purpose of assessing damages, an easy exercise, quite unlike the shares in a private limited company where such facility is not available (see para 35).

[Bahasa Malaysia summary

Responden pertama memasuki satu perjanjian bertarikh 20 April 2005 untuk menjual saham disebuah syarikat yang dikenali sebagai QSR Brands Berhad (QSR) kepada perayu pertama dan juga Chain Valley Ltd (perayu pertama di satu kes lain

No W–02–786–05 yang didengarkan bersama). Responden kedua dan ketiga memasuki satu perjanjian menjual saham mereka di QSR dengan perayu kedua dan ketiga masing-masing. Satu surat kuasa wakil diberikan kepada setiap pembeli oleh penjual masing-masing. Pada 20 Jun 2005, responden keempat memasuki satu perjanjian jual beli dengan responden pertama, kedua dan ketiga masing-masing untuk membeli saham-saham mereka di QSR, yang merupakan saham-saham yang sama yang dipersetujui untuk dijual kepada perayu-perayu pertama, kedua dan ketiga ('blok saham-saham yang dipertikaikan'). Blok ini membentuk 12.73% keseluruhan pegangan saham di QSR. Responden keempat juga membeli saham daripada pemegang saham QSR yang satu lagi yang memegang 20.4% keseluruhan pegangan saham di QSR. Pada hari yang sama, responden keempat, melalui bank saudagarnya, membuat pengumuman umum berhubungan dengan pembelian-pembelian ini. Setelah mendapat tahu melalui pengumuman umum responden keempat, perayu-perayu pertama, kedua dan ketiga bersama dengan perayu keempat (yang menyatakan dirinya sebagai pemegang benefisial dan/atau pemunya di sisi undang-undang perayu-perayu pertama, kedua dan ketiga buat masa kini) memfailkan satu writ saman untuk perisytiharan bahawa perjanjian-perjanjian yang dimasuki di antara responden keempat dengan responden-responden pertama, kedua dan ketiga adalah tidak sah ab initio dan juga satu injunksi menahan defendan-defendan pertama, kedua, ketiga dan kelima (responden-responden pertama, kedua dan ketiga dan UOB), daripada berurusan dengan saham-saham tersebut secara bagaimanapun. Perayu-perayu juga memohon satu injunksi terhadap responden-responden pertama, kedua, ketiga dan keempat dan UOB untuk menahan mereka daripada menjual atau berurusan dengan saham-saham QSR tersebut. Hakim mahkamah tinggi yang bijaksana berpendapat bahawa: (a) oleh kerana ganti rugi dapat ditentukan; (b) bahawa pampasan yang mencukupi kepada perayu-perayu sekiranya mereka akhirnya berjaya di perbicaraan kelak dan; (c) disebabkan tiada bukti bahawa responden-responden tidak di dalam kedudukan kewangan untuk membayar ganti rugi sebegini, jika diawardkan, permohonan ditolak. Perayu merayu. Peguamcara yang bijaksana menghujahkan bahawa blok saham-saham yang dipertikaikan adalah satu 'strategic stake' untuk mendapatkan kuasa ke atas pengurusan QSR dan ganti rugi sebagai pampasan bukan satu remedi yang mencukupi.

Diputuskan, menolak rayuan tersebut:

(1) Tiada kenyataan kuasa pengurusan ke atas QSR ataupun pertaruhan strategi di dalam pliding mereka. Apa yang dinyatakan kemungkinan satu peristiwa yang kemudiannya, selepas keputusan hakim mahkamah tinggi yang bijaksana. Tetapi peristiwa-peristiwa yang kemudiannya tidak boleh digunakan untuk mentafsirkan erti sesuatu terma di dalam perjanjian (lihat *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456). Jika mahkamah rayuan menerima peristiwa yang kemudian, maka tiada had dimana ianya (peristiwa yang kemudian) dapat diterima untuk pertimbangan. Peranan mahkamah rayuan, sebagai mengkaji semula keputusan daripada mahkamah tinggi, harus membatasi dirinya kepada satu set tetap bahan-bahan yang dipertimbangkan, dan ini mestilah 'seperti yang dipertikaikan' di mahkamah di bawah (lihat perenggan 28).

(2) Terma-terma perjanjian menjual saham, adalah terutamanya, bersifat, kontrak kewangan. Pembeli blok saham-saham yang dipertikaikan dibenarkan menjual semula saham-saham pada kadar yang lebih tinggi dan jika sub-jualan dijual dengan harga yang lebih tinggi, pihak-pihak akan berkongsi perbezaannya. Tidak tersirat di dalam perjanjian tersebut dalam apa juga cara, bahawa saham-saham yang akan dijual kepada perayu-perayu adalah untuk mendapatkan kuasa ke atas pengurusan QSR (lihat perenggan 29).

(3) Dari sifat perjanjian menjual saham tersebut, ia adalah satu kontrak untuk menjual dan bukannya satu kontrak jualan yang telah dilaksanakan. Oleh kerana ia adalah satu kontrak untuk menjual, hak pemunyaan terhadap saham-saham tersebut masih dengan responden-responden pertama, kedua dan ketiga. Dan walaupun responden-responden telah memungkiri obligasi mereka dengan keengganan mereka untuk menjual blok saham-saham yang dipertikaikan kepada perayu-perayu, remedi perayu-perayu hanya dihadkan kepada satu tuntutan peribadi terhadap responden-responden untuk ganti rugi, dan bukannya untuk hak pemunyaan terhadap saham-saham tersebut. Apabila relif mereka dihadkan kepada ganti rugi, maka ganti rugi dapat ditaksirkan, dan responden-responden dapat membayarkannya, dengan itu mengikut prinsip yang dibentangkan di dalam kes *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, tiada injunksi interim harus diberikan, tidak kira betapa bagusnya kes perayu-perayu tersebut (lihat perenggan 32).

(4) Surat kuasa wakil hanya satu dokumen subsidiari kepada perjanjian menjual saham tersebut. Tanpa perjanjian menjual saham, yang merupakan instrumen utama, surat kuasa wakil tidak boleh berkekalan. Dengan sendirinya, ia tidak mempunyai nyawa. Ia adalah lampiran kepada perjanjian penjualan saham. Dengan itu apabila perjanjian utama tidak dapat memberikan hak pemunyaan di bawah undang-undang, surat kuasa wakil, satu dokumen subsidiari, juga tidak dapat memberikan hak sebegini (lihat perenggan 33).

(5) Blok saham-saham yang dipertikaikan adalah berhubungan dengan satu syarikat awam yang disenaraikan di Bursa Saham Kuala Lumpur. Saham-saham QSR adalah bebas didagangkan di Bursa Saham Kuala Lumpur. Pendedahan ini membuatkan pengiraan, untuk tujuan mentaksirkan ganti rugi, dengan mudah, berlainan daripada saham-saham di syarikat sendirian berhad di mana tiada kemudahan sebegini (lihat perenggan 35).]

Notes

For cases on injunction to restrain, generally, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2688–2745.

For cases on sale of shares, see 3(1) *Mallal's Digest* (4th Ed2003 Reissue) paras 776–790.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

Dobell v Cowichan Copper Co Ltd 65 DLR (2d) 440 (refd)
Keet Gerald Francis Noel John v Mohd bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Malayan Credit Ltd v MohamedKassim [1965] 2 MLJ 134 (refd)
Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 MLJ 456 (refd)

Legislation referred to
Sale of Goods Act 1957

Appeals from: Suits No D5–22–899 of 2005 and No D5–22–942 of 2005 (High Court, Kuala Lumpur) and

Manjit Singh s/o Gurcharan Singh (C Sri Kumar, Malik Imtiaz Sarwar and Ang Hean Leng with him) (Malik Imtiaz Sarwar) for the appellant in Civil Appeals No W-02–785 of 2005 and No W-02–786 of 2005.
Brijnandan Singh Bhar (Lee Noushi with him) (Gideon Tan Razali Zaini) for the first and third respondents in Civil Appeal No W-02–785 of 2005 and for the first respondent in Civil Appeal No W-02–786 of 2005.
Logan Sabapathy (Logan Sabapathy & Co) for the second respondent in Civil Appeal No W-02–785 of 2005.
Raja Addruse (Dato Dr Cyrus Das, Ambiga Sreenevasen and Rita Elisabeth Iype with him) (Zainal Abidin & Co) for the fourth respondent in Civil Appeal No W-02–785 of 2005 and for the second respondent in Civil Appeal No W-02–786 of 2005.
HL Chan (Azim Tunku Farik & Wong) for the fifth respondent in Civil Appeal No W-02–785 of 2005 and the third respondent in No W-02–786 of 2005.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is associated with another registered under W–02–786 of 2005 (case 786). Before I disclose the nature of this appeal, it is necessary to set out the facts of this case in a chronological manner.

FACTS

[2] *1st set of agreements for the sale of QSR shares*

[3] The first respondent held 15,731,010 ordinary fully paid up shares in a company known as QSR Brands Berhad (QSR). On the 20 April 2005, the first respondent entered into an agreement to sell 6,173,110 of these shares to the first appellant at a purchase price of RM2.80 per share.

[4] On the same day, the first respondent also entered into another agreement to sell 9,557,900 of these shares to Chain Valley Management Limited (Chain Valley), the first appellant in case 786, also at a purchase price of RM2.80 per share.

[5] The second respondent held 5,416,200 ordinary fully paid up shares in QSR. On the 20 April 2005, it entered into an agreement to sell this entire lot of shares to the second appellant at a purchase price of RM2.80 per share.

[6] The third respondent held 8,143,400 ordinary fully paid up shares in QSR. On the 20 April 2005, it entered into an agreement to sell all these shares to the third appellant for a sum of RM2.80 per share.

[7] For convenience, I shall refer to these agreements collectively as 'Sale of Shares Agreement' since they contain identical terms and conditions.

Pertinent features of these sale agreements

[8] The Sale of Shares Agreement contains these pertinent terms:

1. Recital B states: 'The Vendor is desirous of selling, and the Purchaser is desirous of purchasing, the Sale Shares at the Agreed Price (as defined below), on terms that if the Purchaser sells any of the Sale Shares within the Applicable Period (as defined below) at a price higher than the Agreed Price, the Net Gain (as defined below) will be shared between the Vendor and the Purchaser as provided in this Agreement'.
2. The 'Applicable Period' is defined as the period commencing from the date of the agreement (20 April 2005) and expiring on the first anniversary thereof.
3. 'Net Gain' is defined: 'in respect of any Further Sale of any of the Sale Shares by the Purchaser at a price higher than the Agreed Price (as contemplated by clause 3.5) the net amount of the gain, calculated as the amount of the sale price of the Sale Shares in question actually received by the Purchaser, less:
   (a) RM2.80 per Sale Share in question; and
   (b) the amount of expenses actually incurred in effecting such sale, including commission, brokerage, stamp duty and legal fees actually incurred.
4. Clause 3.5 stipulates that:
   (a) if the Purchaser sells a Sale Share pursuant to a Further Sale at a price higher than the Agreed Price, then to the extent there is a Net Gain, the amount of the Net Gain shall be shared as follows:
      (i) In favour and for the benefit of the Vendor, 85% of the Net Gain; and
      (ii) in favour and for the benefit of the Purchaser, 15% of the Net Gain; or
   (b) if the Purchaser sells a Sale Share pursuant to a Further Sale at a price lower than the Agreed Price, then the Purchaser shall bear the amount of the shortfall.
5. Clause 3.4 states: 'For the purpose of giving effect to the intentions set out in this clause 3, the Vendor shall execute and deliver (simultaneously with its

execution of this Agreement) the Power of Attorney in favour of the Purchaser, such Power of Attorney to be in the form mutually agreed between the Parties'.

Pertinent features of the Power of Attorney

[9] The Power of Attorney mentioned in the Sale of Shares Agreement is granted to each purchaser by the respective vendors to, primarily, 'negotiate and enter into, on behalf of the shareholder, such agreement or agreements for the sale or other disposal of all or any of the relevant shares on such terms as it deems fit, and to complete such sale …'. It is irrevocable for a period of 14 months from 20 April 2005.

Kulim Purchases

[10] On 20 June 2005, the fourth respondent (Kulim) entered into sale and purchase agreements with the first, second, third respondents respectively to purchase their respective QSR shares. Since these are the same shares agreed to be sold to the first, second and third appellants (as well as to Chain Valley in case 786) we shall describe them as 'the block of disputed shares'. This block forms 12.73% of the entire shareholding of QSR.

[11] On the same day, Kulim, through its merchant banker, made a public announcement of this purchase.

[12] Also included in this announcement is Kulim's purchase from another QSR shareholder known as Wisdom Technology Sdn Bhd (Wisdom) which held 20.4% of QSR total shareholding.

Reactions of first, second, third and fourth appellants

[13] Upon hearing Kulim's public announcement, the first, second and third appellants together with the fourth appellant (who declares itself as the current beneficial and/or legal owner of the first, second and third appellants) filed a Writ of Summons in the High Court at Kuala Lumpur against the first, second, third respondents, Kulim and one UOB Kay Hian Pte Ltd (UOB) for the following reliefs:

1. A declaration that the Agreements entered into between Kulim and the first, second and third respondents are void *ab initio*.
2. An injunction to restrain the first, second, third and fifth defendants (first, second, third respondents and UOB), whether by themselves or their servants or agents or otherwise howsoever, from doing the following acts or any of them, that is to say selling, negotiating for the sale, disposing, parting and/or dealing with any manner whatsoever the said Shares or any part thereof to any party (inclusive but not limited to the fourth defendant (Kulim)) other than to the first, second and third plaintiffs (first, second, third appellants).

[14] UOB is described by the appellants in their statement of claim as 'a licensed stockbroker in the Republic of Singapore and has the like requisite licensing to carry

out such a business'. UOB is brought into this suit for allegedly holding the block of disputed shares for and on behalf of the second and third respondents.

[15] Aside from this action, Chain Valley and the fourth appellant (who also declares itself as the beneficial and/or legal owner of Chain Valley) filed case 786 against first respondent, Kulim and UOB for similar reliefs regarding the QSR shares sold by the 1st respondent to Kulim which forms part of the disputed block of shares.

Interim Injunction

[16] Simultaneous to the filing of the above actions, the appellants applied for an ex parte injunction against the first, second, third respondents, Kulim and UOB to restrain them from selling or dealing with the said QSR shares. (Similar kind of application was also made by Chain Valley against the first respondent, Kulim and UOB mentioned in that transaction.)

[17] This application was heard on 30 June 2005 by Justice Ramly who granted the order requested on the usual undertaking as to damages. (Similar order was also granted to Chain Valley in its application mentioned above.)

Inter parte Interim Injunction

[18] As the ex parte injunction has a limited life span, the appellants also applied for the same interim relief inter parte. This application (as well as that similarly made by Chain Valley) was heard by Justice Ramly. He dismissed the appellants' application (as well as that of Chain Valley) on 22 July 2005. It is from this decision that the appeal before us lies.

[19] Soon after this decision of Justice Ramly on the 22 July 2005, the disputed block of shares were duly transferred and registered in the name of Kulim who subsequently pledged them to Cimsec Nominees (Tempatan) Sdn Bhd (Cimsec).

Appeal to the Court of Appeal

[20] Dissatisfied with the decision of Justice Ramly, the appellants appealed to this Court (similar appeal is filed in case 786). By consent of parties in this appeal, the decision of this appeal will bind case 786.

The Applicable Law

[21] As this appeal involves the granting or refusal to grant an interim injunction, the basic principle applicable is that stated by Lord Diplock in the *locus classicus* case of *American Cyanamid Co v Ethicon Ltd.* [1975] AC 396 at pp 407–408:

> The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

A It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great B object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing' … So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

C As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure D recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiffs claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was E sought to be enjoined, he would be adequately compensated under the plaintiffs undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

F It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

G Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established H enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

[22] From the grounds of judgment I noted that the learned High Court Judge has applied this principle in his deliberation though he has relied on this Court's decision I in *Keet Gerald Francis Noel John v Mohd bin Abdullah & Ors* [1995] 1 MLJ 193, which, in my view, is a restatement of the proposition in the *American Cyanamid Co*

v Ethicon Ltd, a House of Lords decision that has long been accepted by our Supreme Court as the authority on this area of the law in this country.

Analysis

Firstly, as all parties have agreed with the finding of the learned High Court judge that the appellants have established a serious question to be tried in this case, the first requirement to be satisfied in order to succeed in an application for an interlocutory injunction, I shall move on to the next consideration: whether, if the appellants were to succeed at the trial in establishing their right to a permanent injunction, they would be adequately compensated by an award of damages for the loss they would have sustained as a result of the respondents doing what was sought to be enjoined between the time of the application and the time of the trial. On this issue, the learned High Court judge has this to say:

> Di dalam kes-kes ini, kepentingan asas Plaintif-Plaintif adalah mengenai saham-saham QSR Brands yang dipertikaikan. QSR Brands adalah merupakan sebuah syarikat awam yang disenaraikan di Bursa Saham Malaysia di mana saham-sahamnya diniagakan di pasaran terbuka. Pada sesuatu masa tertentu nilai saham-saham berkenaan dapat ditetapkan melalui harga pasaran di Bursa Saham. Jumlah saham-saham yang dituntut oleh Plaintif-Plaintif juga telah ditentukan. Ini bermakna, kepentingan Plaintif-Plaintif di dalam kes-kes ini dapat ditentukan dalam bentuk wang ringgit. Kepentingan Plaintif-Plaintif di sini adalah merupakan kepentingan kewangan (financial interest) yang boleh dinilai dan ditentukan pada sesuatu masa. Sekiranya permohonan Plaintif-Plaintif ditolak, Plaintif-Plaintif masih boleh mendapatkan apa-apa yang dituntut oleh mereka (ie dalam bentuk nilai kewangan) di penghujung penentuan Writ Saman mereka. Kepentingan asas mereka pada hakikatnya tidak terjejas. Tidak ada bukti yang menunjukkan bahawa Defendan-Defendan tidak berupaya untuk membayar gantirugi berkenaan jika diperintahkan oleh Mahkamah di akhir perbicaraan Writ berkenaan. Tidak ada kerugian lain (yang tidak boleh ditaksir dengan wang ringgit) yang akan dialami oleh Plaintif-Plaintif sekiranya permohonan mereka ditolak. Tidak ada keterangan dan hujahan yang menunjukkan Plaintif-Plaintif akan mengalami kehilangan 'control' ke atas Syarikat QSR Brands memandangkan jumlah saham-saham yang dipertikaikan tidak begitu besar untuk membolehkan Plaintif-Plaintif memperolehi 'control' keatas QSR Brands. Ciri-ciri 'control' tidak timbul dalam keadaan sedemikian."

[23] In brief, the learned High Court Judge felt that: (a) since damages can be ascertained; (b) that it is an adequate compensation for the loss to appellants if they were to finally succeed at the trial and; (c) there being no evidence that the respondents are not in a financial position to pay such damages, if awarded, this application should be dismissed.

[24] Against this finding, Mr Manjit Singh, counsel for the appellants, attempted to convince this court that the block of disputed shares is a 'strategic stake' and damages as compensation is an inadequate remedy. He pointed out that this phrase (strategic stake) appears in cl 9.1 of the Sale of Shares Agreement. But when enquired by this court as to the context of this, he said that it must be ascertained from the four corners of the Sale of Shares Agreement. This prompted me to immediately examine cl 9.1 of the Sale of Shares Agreements which reads:

Investment

The Vendor acknowledges that the Agreed Price has been agreed by the Purchaser on the basis, inter alia, that the Purchaser invests in the Sale Shares as part of a strategic stake in the Company and to obtain the powers conferred under the Power of Attorney for the duration provided therein.

[25] As can be seen, on its own, this clause gives no indication on why these shares are a strategic stake. This prompted me to examine other clauses in the Sale of Share Agreement for enlightenment. Apart from: (a) allowing the purchaser of the disputed shares to dispose off the shares mentioned in the agreement and (b) if the price for this disposal is higher than a certain amount the difference would be shared by the parties, I also could not find any indication as to why this disputed block of shares is strategic.

[26] Aware of my concern over this matter, Mr Malik Imtiaz, junior counsel for the appellants, responded by declaring that this disputed block of shares is strategic to gain control over the management of QSR, and damages as compensation would not be an adequate remedy for this purpose. He cited *Dobell v Cowichan Copper Co Ltd* 65 DLR (2d) 440 and *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 for support.

[27] But over this claim, both Dato Dr Cyrus Das, counsel for the first, second and third respondents, and Mr Logan, counsel for Kulim, were quick to point out that this claim for management control over QSR was not even pleaded in the appellants' original statement of claim and there was no prayer for specific performance which is normally requested in situation where pecuniary compensation is not an adequate remedy.

[28] I find these observations of the two respondents' counsel compelling. If the disputed block of shares is strategic in the manner as described by Mr Malik Imtiaz, then I would have thought that the appellants would have foremost disclosed this in their pleadings and demanded specific performance of the Sale of Shares Agreement. Then at the hearing of the inter parte injunction pressed on with this fact. But none of these took place. It was only after Justice Ramly's refusal of the inter parte injunction that the appellants amended their statement of claim to include a claim for specific performance, but still there was no assertion of management control over QSR or of the strategic stake. The absence of this claim at the material time as discussed has cast grave doubt over the explanation advanced by Mr Malik Imtiaz on the context of the strategic stake. To me, what he has disclosed, perhaps, may be an event subsequent to the said decision of Justice Ramly. But such subsequent events cannot be resorted to construe a meaning of a certain term in the agreement — see *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456. If the appellate court were to accept such subsequent event, then there would be no limit as to the extent to which these (subsequent events) are to be received for consideration. I feel that the appellate

court, in the role of a reviewer of decision from the High Court, must confine itself to a fixed set of materials for consideration, and this must be those 'as argued' in the court below.

[29] Having perused the terms of the Sale of Shares Agreement, I am of the view that it is primarily, by nature, a monetary contract. The purchaser of the disputed block of shares is allowed to resell the shares at a higher price and if the sub-sale fetches a higher price the parties will share the difference. The tone expressed in the agreement certainly does not imply, in any manner whatsoever, that the shares to be sold to the appellants are for leverage to gain control of the management of QSR. In fact, the factual situation at the material time of the Sale of Shares Agreement does not even support this claim. The first, second and third appellants (including Chain Valley in case 786) were never in a position at that time to control QSR. They simply held no shares of their own to mount such management control exercise. As for the fourth appellant, it only came into the scene seven days after Kulim's public announcement. This is evidenced by the pay-in-slip showing the parting of consideration by the fourth appellant to the various vendors for acquisition of the first, second and third appellants.

[30] Apart from the above, Mr Logan has also brought to this court's attention that since the Sale of Shares Agreement involves a transaction of shares, the Sale of Goods Act 1957 ('the Act') applies. According to him, under the terms of the Sale of Shares Agreement, the sale of the shares will only be completed at a later date, not at the time of the execution of the agreement. Under such circumstances, the transaction is a contract to sell, not a sale. When it is a contract to sell, the purchaser has only a personal remedy against the seller. The goods remain with the seller and the seller continues to possess the right of disposal over the goods. In short, this means that the first, second and third respondents (and first respondent in case 786) can dispose off the disputed block of shares to Kulim and the appellants' remedy, even if they may have a valid and existing contract with these vendors, is only for damages. They have no proprietary right to the shares.

[31] I find much force in this argument. The distinction between a contract to sell and an actual sale contract is well illustrated by Hepworth J in *Malayan Credit Ltd v Mohamed Kassim* [1965] 2 MLJ 134 at p 135:

> The term 'contract of sale' includes both actual sales and agreements for sale. It is important to distinguish clearly between the two classes of contract. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale is a contract plus a conveyance. By an agreement to sell *a jus inpersonam* is created, by a sale a *jus in rem* also is transferred. Where goods have been sold, and the buyer makes default, the seller may sue for the contract price, but where an agreement to buy is broken, the seller's normal remedy is an action for unliquidated damages. If an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietary remedies in respect of the goods themselves.

[32] By the nature of the Sale of Shares Agreement, I hold that it is a contract to sell rather than an executed contract of sale. Being only a contract to sell, the proprietary right to the shares remained with the first, second and third respondents. And even if these respondents have breached their obligation by refusing to sell this disputed block of shares to the appellants, the appellants' remedy is restricted to a personal claim against the respondents for damages, not for the proprietary right to the shares. When their relief is confined to damages, and such damages can be assessed, and the respondents are able to pay for them, then according to the principle laid out in *American Cyanamid v Ethicon Ltd*, no interim injunction should be granted, however strong the case of the appellants may be.

[33] Refusing to concede, Mr Malik Imtiaz argued that aside from the Sale of Shares Agreement, there is also the Power of Attorney. This instrument gives certain powers to the appellants in respect of the disputed block of shares. But it is my view that this instrument (Power of Attorney) is only a subsidiary document to the Sale of Shares Agreement. Without the Sale of Shares Agreement, which is the principal instrument, the Power of Attorney cannot subsist. It does not have a life of its own. It is appendant to the Sale of Shares Agreement. So when the principal agreement cannot give proprietary right in law then the Power of Attorney, a subsidiary instrument, also confers no such right.

[34] The next contention of the appellants relates to the adequacy of damages for the disputed block of shares. According to Mr Malik Imtiaz, when stock and shares are the subject matter of an interim injunction, damages as a form of compensation are inadequate. He cited the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 where at p 269, Jemuri Serjan CJ (Borneo) declares:

> The majority of these damages clearly do not admit of easy quantification and it would not be right for us to venture into the realm of speculation as to what the exact quantum would be at this stage of the proceedings. Besides, the value of the shares fluctuate from time to time. In this regard we find support in the observation of Sach LJ in the case of *Evans Marshall & Co Ltd v Bertola SA & Anor* / 1973] 1 All ER 992 at p 1005; [1973] 1 WLR 349 at p 380 thus:
>
> > The courts have repeatedly recognized that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples — see also, in another sphere, the judgment of Jenkins LJ in *Vine v National Dock Labour Board* [1956] 1 QB 658 at p 676 which, albeit a dissenting judgment, was unanimously adopted in toto in the House of Lords. Generally, indeed, the grant of injunctions in contract cases stems from such factors.

[35] But the facts in *Alor Janggus Soon Seng Trading Sdn Bhd v Sey Hoe Sdn Bhd* are distinguishable in one crucial aspect. It concerned shares in a private limited company whilst in our instant case, the disputed block of shares is that of a public company listed in the Kuala Lumpur Stock Exchange. QSR shares are freely traded in the Kuala Lumpur Stock Exchange. This exposure makes quantification, for

purpose of assessing damages, an easy exercise, quite unlike the shares in a private limited company where such facility is not available. This fact was appreciated by the learned High Court judge when he adopted a commentary in 10 *Halsbury's Laws of Malaysia* para 180.403 which says:

> If, however, there is a free market in the shares in question such as on the Kuala Lumpur Stock Exchange (KLSE) and perhaps the Malaysian Exchange of Securities Dealing and Automated Quotation Berhad (MESDAQ), specific performance of a contract to purchase shares will not be granted, as damages are an adequate remedy.

[36] The second case cited by Mr. Malik Imtiaz on this issue is the British Columbia (Canada) Supreme Court case of *Dobell v Cowichan Copper Co Ltd*, where Mr Justice Seaton declared:

> In this case the evidence indicates that damages are in fact an inadequate remedy. There are numerous cases as to the appropriate remedy for the taking of shares (see, among others demonstrating the doctrine) …

[37] But we wish to point out that the shares sought to be injuncted in *Dobell v Cowichan Copper Co Ltd* were required for a take-over battle in a company. Furthermore, there was evidence that the corporation concerned in that case would not be able to pay damages. This, as discussed at length, is not the situation here. *Dobell v Cowichan Copper Co Ltd* is therefore distinguishable.

[38] For reasons aforesaid, on the issue of adequacy of damages, I would uphold the High Court's finding that since damages are an adequate remedy, that it could be ascertained with no evidence to imply that the respondents are not in a position to pay them in the event of the appellants eventually succeeding in this action, then no injunction will be granted in favour of the appellants at this stage of the proceedings however strong the appellants' case may be.

[39] Though there is no necessity for me to consider in whose favour the balance of convenience lies now that damages have been ruled to be an adequate remedy but, for sake of completeness, I would like to point out that it leans against the appellants for these reasons:

[40] First, the appellants have not suffered any hardship. They have not paid for the disputed block of shares. Unlike Kulim, who has spent approximately RM126m for the acquisition of this disputed block of shares. Disagreeing, Mr Malik Imtiaz argued that Kulim brought this hardship upon itself. Kulim need not indulge in such an undertaking. But I find this argument baseless when in an open market system anyone is free to invest in whatever he likes as long as it is in accordance with the law. Kulim has acquired these shares for valuable consideration on a willing buyer and willing seller basis and the vendors verily believed that they had a right to dispose of their respective shares to Kulim.

[41] Second, Kulim after the acquisition of this disputed block of shares, as well as those from Wisdom and some from the open market, has made a mandatory general

offer for the remaining QSR shares as required by the Malaysian Code on Takeovers & Mergers, 1998. By this announcement, there would be reasonable expectation from minority shareholders of QSR for Kulim to take up their shares at the price specified in the general offer. All this would have to be called off if the acquisition of the disputed block of shares is injuncted. This would have serious repercussions on the investing public where trust in an open offer made by a particular party will be carried out is one of the hallmarks for reliable stock market. This, in fact was taken into account by the learned High Court judge as a factor in refusing the appellants' request for the interim injunction.

[42] Third, the disputed block of shares is now duly registered in the name of Kulim. This was effected soon after the High Court refused to grant the appellants' application for the interim injunction and these shares have now been pledged to Cimsec. If this situation is reversed there would be enormous repercussions and many people would be severely affected as compared to those relatively minor set backs faced by the appellants which, as elaborated, could be compensated by damages. Thus on the balance of convenience, I hold that the interim injunction sought by the appellants ought not to be granted.

CONCLUSION

[43] Accordingly, I am of the view that this appeal should be dismissed with costs and the deposit for this appeal be given to the respondents towards taxed costs.

[44] These grounds of judgment have the concurrence of my learned brothers, Abdul Aziz bin Mohamad JCA and Zulkefli bin Ahmad Makinudin JCA.

Appeal dismissed.

Reported by Sally Kee